SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 870

ALBERT H. GRISHAM, PETITIONER,

vs.

CHARLES R. HAGEN, Warden

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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A IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

(File endorsement omitted)

No. 12,630

ALBERT H. GRISHAM, Petitioner,
Appellant

v.

JOHN C. TAYLOR, Warden, U. S. Penitentiary, Lewisburg, Pennsylvania, Respondent,
Appellee

Appeal from Judgment and Order of United States District Court for the Middle District of Pennsylvania denying petition for writ of habeas corpus and dismissing rule to show cause

Appendix to Appellant's Brief—Filed August 11, 1958

1a IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(Title omitted)

No. 330 Habeas Corpus Docket

Docket Entries

Oct. 26, 1957, Petition for writ of habeas corpus. Copies to U. S. Attorney.
Nov. 5, 1957, Rule to Show Cause. Copy to U. S. Attorney and counsel for Petitioner.
Nov. 25, 1957, Return and Answer.
Jan. 2, 1958, Order setting hearing at Lewisburg for Jan. 27, 1958.
Jan. 27, 1958, Respondent's Exhibit G.
Jan. 27, 1958, Petitioner's Exhibit 1. (Copy of Court Martial Trial.)
2a Jan. 27, 1958, Clerk's Minute of hearing.
April 22, 1958, Opinion and Order. Petition denied rule discharged. Copies mailed counsel.
April 23, 1958, Notice of Appeal. Copies to Govt. Counsel and Clerk C. C. A.

May 29, 1958, Order extending time for docketing record on appeal ninety days from April 22, 1958. Copy to counsel and U. S. Court of Appeals.
June 5, 1958, Transcript of hearing of Jan. 27, 1958.

3a IN UNITED STATES DISTRICT COURT

Petition for Writ of Habeas Corpus—October 26, 1957

To the Honorable, the Judges of Said Court:

Your Petitioner, ALBERT H. GRISHAM, respectfully represents:

1. Petitioner is a citizen of the United States, domiciled in the City of Nashville, State of Tennessee.

2. He is now unjustly and unlawfully confined, deprived of his liberty, and imprisoned against his will, and in violation of his rights under the Constitution and laws of the United States, in the United States Penitentiary at Lewisburg, Pennsylvania, by John C. Taylor, Warden of said Penitentiary, and within the jurisdiction of this Court.

3. The cause or pretext of this detention is the sentence of a General Court Martial appointed by the Commanding General, USAREUR, Communications Zone, U. S. Army, convened at Orleans, France, 20 March, 1953. pursuant to the following orders, Par 5, SO 47, Hq USAREUR Communications Zone, dtd 10 Mar 53; as amended by Par 15, SO 50, Hq. USAREUR Communications Zone, dtd 13 Mar 53; as further amended by Par 9, SO 54, Hq. USAREUR Communications Zone, dtd 19 Mar 53., as follows:

4a "Albert Grisham, it is my duty as president of this court to inform you that the court in closed session and upon secret written ballot, three-fourths of all the members present at the time the vote was taken concurring, sentences you to be confined at hard labor for the term of your natural life."

4. Your Petitioner was subsequently committed to the custody of the Attorney General who is executing the sentence of said Court Martial through the Respondent.

5. The record of trial of Petitioner by General Court Martial, on which his conviction and sentence are based, is on file in the Office of the Judge Advocate General of the Army, in the Pentagon, Washington 25, D. C. and is referred to as part hereof and as Petitioner's Exhibit A. A review of the record of trial is necessary for the Court's determination of Petitioner's right to a Writ of Habeas Corpus.

6. Petitioner's sentence is based upon, and immediately followed, a finding of guilty of the charge of violation of the Uniform Code of Military Justice, Article 118. The only specification under this charge alleged:

"Specification: In that Albert H. Grisham, European Command, U. S. Army, Orleans District Engineers, a person employed by the U. S. Army and serving with the U. S. Army outside the continental limits of the United States, did, at Orleans, France, on or about 6 December 1952, with premeditation, murder Dolly D. Grisham by means of striking her on the head and body with a bottle, striking her on
5a the head and body with his fist, and kicking her on the head and body with his feet.

Signature of Accuser:
(s) Robert Erlenkotter
ROBERT ERLENKOTTER

Rank and Organization:
Colonel, Orleans District Engineer"

7. The sentence of the Court Martial to confinement at hard labor for life has since been reduced by clemency action to 35 years; and the United States Penitentiary, Lewisburg, Pennsylvania, has been and is designated as the place of confinement.

8. Petitioner has exhausted his administrative remedies in that his case was reviewed by the Office of the Staff Judge Advocate and approved by the Commander

who convened the Court. The record was further forwarded to a Board of Review in the Office of the Judge Advocate General, which sustained his conviction. An appeal was then taken to the United States Court of Military Appeals, which also reviewed his case and sustained the conviction. The exact dates, docket numbers, and records concerning the exhausting of Petitioner's administrative remedies are not in his possession, nor are they readily available to him. Petitioner believes and therefore avers, however, that these records are on file in the Office of the Judge Advocate General of the Army in the Pentagon, Washington 25, D. C.

9. From May, 1946, to December 6, 1952, the date of the alleged premeditated murder, Petitioner was a civilian employee of the District Engineer, Nashville District, having received his appointment as such civilian em-
6a ployee under the U. S. Civil Service Commission, and was not a member of the Armed Forces of the United States. On September, 1952, Petitioner was temporarily loaned to the Orleans District Engineers.

10. The charge on which the Petitioner was tried by Military General Court Martial is a capital offense, and the acts charged against Petitioner were allegedly committed at 74 Bd. Alexandre Martin, where Petitioner and his wife were residing, in the City of Orleans, France, which is within the jurisdiction of the French authorities, and is not located on a military base.

11. The victim was Petitioner's wife, Dolly D. Grisham, a United States citizen, and a civilian who had no connection with the United States Army, other than the fact that she was married to the Petitioner, a civilian Civil Service employee of the District Engineers.

12. Before the Court Martial convened, Petitioner moved to dismiss the proceedings on the ground that the General Court Martial, which had been convened to try him, did not have jurisdiction. (See page 22 et sec. of the record of trial, Exhibit A.) The record of trial which was given to Petitioner is not complete so far as the matter of jusidiction is concerned, because two paragraphs of Appellant's Exhibit No. 1, page 1, were deleted, or cut

from the record ". . . for reasons of national security". These deleted paragraphs, which were cut from the record, are on fe in the Office of the Judge Advocate General of the Army, and the Petitioner believes, and therefore avers, that these items will show that the Justice Department of the French Republic was extremely reluctant to surrender jurisdiction to the military authorities in this case,
7a and that the French authorities had charged Petitioner with murder, subsequently reduced to aggravated assault, a lesser offense, which was not capital in nature.

13. The issues of Petitioner's sanity and of intoxication were of vital importance in his conviction, and were decided against him in accordance with the manual issued under the President's name with regard to the defenses of insanity and intoxication in Military Trials.

14. The confinement, deprivation of liberty and imprisonment of Petitioner is unlawful in that, under the facts alleged, the provisions of the Uniform Code of Military Justice, under which the court martial asserted jurisdiction over Petitioner, Article 2 (11) of Uniform Code of Military Justice, 50 U. S. C., Section 552 (11), is unconstitutional, being a direct violation of Article III, Section 2, and the Fifth and Sixth Amendments to the Constitution. (See Reed vs. Covert and Kinsello vs. Kruger, 77 S. Ct. 1222, Advance sheet No. 16 July 1, 1957, and cases cited therein.)

WHEREFORE, to relieve him of his unlawful and unjust imprisonment, your Petitioner prays that:

1. A Writ of Habeas Corpus, directed to the said John C. Taylor, Warden of the U. S. Penitentiary at Lewisburg, Pennsylvania, may issue in his behalf so that your Petitioner may be brought before this Court to do, submit to, and receive what the law may direct;

2. That Responder† be required to show cause, if any he has, why Petitioner should not be released and discharged, and as part of said cause be directed and
8a required to file in this proceeding the original, or a certified copy of the Record of Trial of Petitioner by General Court Martial, including the two paragraphs cut

from page 1, in Appellate's Exhibit No. 1, referred to above;

3. That the Court order Petitioner's release and discharge from prison, and grant him liberty.

Albert H. Grisham
Petitioner

IN UNITED STATES DISTRICT COURT

Return and Answer—November 25, 1957

Comes now the respondent, John C. Taylor, Warden, United States Penitentiary, Lewisburg, on whom has been served a rule to show cause why a writ of habeas corpus should not be granted and by his attorneys makes return and answer to the said rule and respectfully shows to the court that he holds the said Albert H. Grisham by authority of the United States as a prisoner pursuant to the sentence of a general court martial under the following circumstances:

I.

That the said Albert H. Grisham, a civilian employee of the Department of the Army and a person employed by and serving with the armed forces within the meaning of Article 2(11), Uniform Code of Military Justice (10 USC 802 (11)), was duly arraigned for the offense
9a of premeditated murder in violation of Article 118, Uniform Code of Military Justice (10 USC 918) before a general court martial convened by paragraph 8, Special Orders Number 47, Headquarters, United States Army Europe Communications Zone, APO 58, dated 8 July 1953, as amended by paragraph 15, Special Orders Number 50, same headquarters, dated 13 March 1953, and paragraph 10, Special Orders Number 54, same headquarters, dated 19 March 1953. At the arraignment the petitioner stood mute. Thereupon the Court entered a plea of not guilty on his behalf to the offense charged. He was found not guilty of the premeditated murder but guilty of the lesser and included offense of unpremeditated murder, in violation of Article 118, Uniform Code of Mili-

tary Justice (10 USC 918). He was sentenced by the court martial to be confined at hard labor for the term of his natural life.

Prior to the plea on the general issues the petitioner moved to dismiss the charge on the ground that the court martial lacked jurisdiction to try the petitioner and the offense charged. This motion was predicated on petitioner's contention that jurisdiction over the person and offense remained with France and that nation had not waived such jurisdiction to the United States. The Law Officer denied the motion. The Staff Judge Advocate in the review of the record of trial and in the submission of his written opinion thereto to the convening authority under the provisions of Article 61, Uniform Code of Military Justice (10 USC 861) considered the merits of the petitioner's motion and the propriety of the Law Officer's ruling thereon and determined that the denial of this motion was proper and correct (Exhibit D). On 8 July 1953 the convening authority, in taking his action upon the case as required by Articles 61 and 64, Uniform Code of Military Justice (10 USC 861 and 864), approved the sentence. The record of trial was then forwarded to The Judge Advocate General of the Army for a review by a Board of Review as required by Article 66, Uniform Code of Military Justice (10 U.S.C. 866). An authenticated copy of General Court Martial Order Number 61, Headquarters USAREUR Communications Zone APO 58, dated 8 July 1953, promulgating the findings and sentence as approved by the convening authority is attached hereto (Exhibit A).

10a

On 3 September 1953, appellate counsel for the petitioner, filed an assignment of errors with the Board of Review. One of the principal contentions pressed by the petitioner was that the evidence was insufficient at the court-martial to establish that the petitioner was a civilian employee of the Department of the Army, amendable to court-martial jurisdiction under Article 2(11) Uniform Code of Military Justice (10 USC 802 (11)). It was admitted that the record of trial established that the petitioner was employed by the Nashville District Engineers, United States Army, and that he was subsequently trans-

ferred to Europe for temporary assignment with the Orleans District Engineer Office, United States Army, at Orleans, France. However, the petitioner contended that those facts were insufficient to establish whether his employment "related to activities of the Armed Forces of the United States or to some other European Construction Activity."

On 11 December 1953, the Board of Review rendered its decision in the case. After a lengthy and detailed statement of facts which set forth all pertinent data and
11a material, the Board of Review stated its conclusions with respect to the sufficiency of the evidence to establish petitioner's amenability to court-martial jurisdiction. The Board of Review found that the evidence in the record established that at the time of the alleged offense the petitioner "was an employee of the United States Corps of Engineers on six month's temporary duty with the Orleans District Engineer Office at Orleans, France," and that he "was clearly a person 'serving with, employed by, or accompanying the Armed Forces without the continental limits of the United States' within the meaning of Article 2 of the Uniform Code of Military Justice. He was therefore a person subject to the Code and properly triable by courts-martial." The Board of Review found the approved findings of guilty and the sentence correct in law and fact and having determined, on the basis of the entire record, that they should be approved, affirmed the same (Exhibit E). The United States Court of Military Appeals granted the petitioner a review of the decision of the Board of Review under the provisions of Article 67, Uniform Code of Military Justice (10 USC 867). On 24 September 1954 the United States Court of Military Appeals affirmed the decision of the Board of Review (Exhibit F). Final appellate review under the provisions of Article 71c, Uniform Code of Military Justice (10 USC 871c) having been completed, the sentence was ordered executed on 15 October 1954. The United States Penitentiary, Lewisburg, was designated as the place of confinement. On 8 March 1957, by clemency action the Secretary of the Army reduced the period of confinement to 35 years (Exhibit C). An authenticated copy of General Court-Martial Orders Number 48, Headquar-

ters Second Army, Fort George G. Meade, Mary-
12a land, 15 October 1954, promulgating the results of the affirming action and ordering the sentence into execution is appended hereto (Exhibit B).

II.

Answering the allegations contained in the petition for writ of habeas corpus, the respondent admits, denies and alleges as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition except the allegations that the imprisonment is unjust and unlawful and specifically denies that such imprisonment is unjust and unlawful and in violation of his Constitutional rights.

3. Admits Albert H. Grisham was tried by an Army General Court-Martial at Orleans, France between 20 and 27 March 1953, that he is now confined pursuant to a General Court-Martial sentence, imposed upon conviction of an offense in violation of the Uniform Code of Military Justice (10 USC 801 et seq.), committed by the said Albert H. Grisham on 6 December 1952, while Grisham was a France; and denies all other allegations in paragraph 3 of the petition.

4. Admits the allegations contained in paragraph 4 of the petition and alleges that the Attorney General designated the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement.

13a 5. Admits that the original record of trial by general court-martial in the case of the petitioner is on file in the Office of The Judge Advocate General of the Army and alleges that the petitioner was properly served with an exact copy thereof and denies all other allegations of paragraph 5 of the petition.

6. Admits the allegations contained in paragraph 6 of the petition.

7. Admits the allegations contained in paragraph 7 of the petition.

8. Admits the allegations contained in paragraph 8 of the petition but alleges that the decision of the Board of Review and the opinion of the United States Court of Military Appeals are published in 13 CMR 486 and 16 CMR 268, respectively.

9. Admits that petitioner was not a member of the Armed Forces of the United States; but alleges that at the time of the offense of which he was convicted and the trial by court-martial he was a Department of the Army civilian employee, assigned to the United States Army Corps of Engineers on temporary duty with the Orleans District Engineer, at Orleans, France.

10. Admits the allegations contained in paragraph 10 of the petition and alleges that jurisdiction was waived by the French authorities under the terms of the treaty between the United States and France.

11. Admits Dolly D. Grisham, a United States citizen, was a civilian and dependent wife of Albert H.
14a Grisham, a civilian employee of the Department of the Army; and denies all other allegations of paragraph 11 of the petition.

12. Admits petitioner moved to dismiss the charges at his court-martial on the ground that the court-martial lacked jurisdiction over the said petitioner and the offense; and denies all other allegations of paragraph 12 of the petition.

13. Denies the allegations contained in paragraph 13 of the petition.

14. Denies the allegations contained in paragraph 14 of the petition.

III.

Further answering the respondent avers:

a. That the prisoner was a civilian employee of the Department of the Army and that he was accompanying, employed by, and serving with the armed forces without the continental limits of the United States both at the time of the offense for which he was tried by court-martial, and at the time of trial.

b. That the general court-martial by which the prisoner was tried and convicted had jurisdiction over the person of the prisoner and of the offense charged against him, and that the sentence adjudged against the prisoner by the court-martial was within the legal limits and within the power of the Court to adjudge.

WHEREFORE, the respondent respectfully prays this Honorable Court that the rule to show cause be discharged, that the petition for writ of *habeas corpus* be dis-
15a missed, and that the petitioner, Albert H. Grisham, remain in the custody of the respondent.

(s) Robert J. Hourigan
United States Attorney

(s) Lt. Col. Cecil I. Forinash
The Judge Advocate General's Corps
United States Army

(s) Lt. Col. Peter S. Wondolowski
The Judge Advocate General's Corps
United States Army

16a IN UNITED STATES DISTRICT COURT

Excerpts From Transcript of Testimony

[Line 20, p. 3 to Line 7, p. 10 incl.]

Direct Examination

BY MR. KALP:

Q. You are Albert H. Grisham?
A. Yes.
Q. Where is your home?
A. Nashville, Tennessee.
Q. I call your attention to the month of September, 1952. How were you employed at that time?
A. I was employed by the United States District Engineer, Nashville.

Q. And what was your status with the District Engineer's office at Nashville?

A. I was a civil service employee, G.S. 9, cost accounting.

Q. And what were you working on?

A. You mean the type of work?

Q. What was the nature of your work?

A. I was cost accountant, sir.

Q. And in connection with what projects?

A. Primarily the maintenance and improvement of existing river and harbor works, and construction of multiple control dams. However, during the Korean Conflict, or along about that time, our district was engaged in rehabilitating certain installations that had been used by the Army during the war, but my payment was made at all times from civilian funds, Civil Works.

17a Q. Now what happened about September 30, 1952?

A. I was placed on temporary duty for six months with the United States Army in Europe.

Q. And where were you assigned?

A. I was assigned, upon arrival over in Europe, to Orleans, France.

Q. And when did you arrive there, approximately?

A. The first day of October, I believe. I am almost sure it was the first day of October.

Q. What was the nature of the work to which you were assigned in Orleans, France?

A. Along with two other individuals, we were setting up a cost accounting system for the building of the line of communication from Pardeau, France, to Kossalater, Germany, which came under NATO.

Q. Now I call your attention to December 6 and 7, 1952. Where were you residing at that time?

A. I was living at 74 Alexandre Martin Boulevard, in Orleans, France.

Q. And what was the nature of your quarters there?

A. It was an apartment.

Q. And from whom did you rent this apartment?

A. It was a French lady. I don't know her name. I can't pronounce it.

Q. A French civilian?

A. Yes.

Q. And I believe sometime before December 6th your wife came over to live with you, is that right?

A. That's correct.

Q. Can you tell us when she came over?

A. She arrived either on the 30th day of November, or the first day of December.

18a Q. And she was living with you in this apartment, was she not?

A. Yes, sir.

Q. Who was furnishing the food for you and your wife?

A. We were.

Q. Who was furnishing your medical care?

A. Well, I don't know whether I was authorized medical care or not, but I was furnishing it.

Q. And who furnished transportation for you to and from your place of employment?

A. I did, sir.

Q. And how far was your place of employment from this apartment?

A. About two miles. However, I would like to amend that last statement. They had a lot of vehicles running around, busses, and so on; and if you wished to avail yourself, you could ride to certain stop areas within the City, and it was optional. However, I usually did furnish my own transportation.

Q. When you say "they" you mean the military authorities?

A. Yes sir.

Q. Who paid you while you were working in France?

A. The Nashville office.

Q. Of what?

A. The Corps of Engineers, Nashville District. They paid their check and deposited it in the bank to my credit. They were reimbursed on a standard Form 1080, I believe, by the United States Army in Europe.

MR. KALP: That's all.

19a *Cross-Examination*

BY LT. COL. FORINASH:

Q. I just have one or two questions.

Medical care was available to you from the Army in Orleans, France, was it not?

A. I do not know, sir. To the best of my knowledge,

I was never told that we could get medical care there. I know that we were sent out, as I recall, once to have our teeth examined. I don't know whether that was a requirement or a courtesy extended by the Army.

Q. In addition, was a Post Exchange available in the Orleans district in France?

A. Yes.

Q. You had access to that?

A. Yes.

Q. And they sold food, and so on, did they not?

A. In the Post Exchange they sold—I don't believe they sold staples, Colonel. They sold various things, but I don't think they sold staple foods. In fact, I am sure they didn't.

Q. And in addition to the Post Exchange, there was also a commissary which the families used in that area?

A. Which I had privilege to use, but which my wife did not have privilege to use.

Q. That was because she hadn't been there a sufficient time?

A. I had applied to have her declared a dependent. It had to be cleared through the Ambassador, and I was told in Paris, and that had never been cleared through there, and I was never notified that she had been designated as a dependent.

20a Q. Now, you received an additional allowance over and above your pay as G.S. 9?

A. Travel pay, yes.

Q. And an additional monthly allowance?

A. No, sir.

Q. And the so-called Station Allowance?

A. I was allowed per diem only.

Q. When you are on per diem, you are not entitled to a Station allowance?

A. No, I don't think so.

Q. And the per diem is to secure quarters in lieu of furnishing of such quarters by the military, isn't that the purpose?

A. I think so, yes.

Q. You were a civilian employe for how long?

A. Since 1936, other than the fact that I was in the Army for about 52 months during the war. But even so,

I was on military furlough during that period. I was still carried on the rolls at Nashville, Tennessee, continuously since 1936.

Q. You know, though, that per diem allowed by the Army is to pay for your housing, in lieu of housing which normally is furnished by the Army?

A. Yes, sir, that's true, Colonel, or by any government agency, in fact.

Q. And you were paid for your work in Orleans, France, by the United States Army?

A. My checks were drawn, as I say, I remained on the Nashville roll, and my checks were drawn from civilian works funds. It was reimbursed by the Army. So, I thought that I was there more or less for a specific purpose which could be compared, it seems to me, to
21a selling supplies to the Army. I was selling them service, more or less.

Q. The civil works, of course, which you refer to, is nothing more or less than the United States Army Engineers—

A. Civil works, sir, not military, no connection whatever with the military. Civil works is just what it means, civil works, sir.

Q. Accomplished by the United States Army Engineers Corps?

A. Yes.

Q. And under the supervision of the Secretary of the Army?

A. Yes, sir, that's correct.

LT. COL. FORINASH: I have nothing further.

MR. KALP: That's all.

(Witness excused.)

22a IN UNITED STATES DISTRICT COURT

V.

Opinion—April 22, 1958

This habeas corpus proceeding poses the question as to whether a civilian employee attached to the armed

forces of the United States stationed in a foreign country is subject to trial by court-martial for a capital offense.

The issue arises on a return and answer to a rule to show cause granted in response to a petition for a writ of habeas corpus filed by petitioner, a prisoner confined at the United States Penitentiary at Lewisburg, Pennsylvania, against the Warden of the Penitentiary.

The record of the court-martial was introduced into evidence.

The petitioner, Albert H. Grisham, a Department of the Army civilian employee assigned to the Corps of Engineers, United States Army, Nashville District, Nashville, Tennessee, arrived in France on October 1, 1952, and was assigned for temporary duty with the Orleans District Engineer, Office Headquarters USA REUR Communications Zone, Orleans, France. On November 1, 1952, he was joined by his wife, Dolly Dimples Grisham, and they established residence at 74 Boulevard Alexander Martin in Orleans, France.

On the evening of December 6, 1952, petitioner and his wife attended a cocktail party, where both became somewhat intoxicated. Mrs. Grisham was last seen alive by witnesses other than her husband, returning
23a home with her husband, the petitioner, at about 9:45 o'clock that evening. The following morning she was found lying dead, in her bed. He head, face and body were bloody, bruised and battered. An autopsy revealed that the cause of her death was "severe hemorrhage in the chest wall and in the abdomen and tissues of the body."

Petitioner was arrested by the French authorities. On December 23, 1952, France waived jurisdiction over the petitioner and the offense, and released the petitioner to the jurisdiction of the American Military Authorities. Petitioner was subsequently tried by a United States Army General Court-Martial between March 20 and 27, 1953, for the premeditated murder of his wife, in violation of Article 118, Uniform Code of Military Justice (10 U.S.C. Sec. 918). At the trial the petitioner objected to his trial by general court-martial on the ground that the court-

martial lacked jurisdiction over his person and the offense charged. Petitioner contended that exclusive jurisdiction over the offense upon which he was arraigned was vested in France and was punishable only under French law. The general court-martial denied the motion to dismiss the charge and specification on the ground of lack of jurisdiction. Petitioner remained mute at the time of arraignment, and a plea of not guilty was entered on his behalf by the law office. Petitioner was found not guilty of premeditated murder guilty of the lesser and included offense of unpremeditated murder in violation of Article 118, Uniform Code of Military Justice (10 U.S.C. Sec. 918), and was sentenced by the court-martial to be confined at hard labor for the term of his natural life. The sentence was subsequently reduced by clemency action to thirty-five years.

24a The alleged authority for the jurisdiction of the general court-martial which tried petitioner is Article 2 (11) of the Uniform Code of Military Justice (64 Stat. 107, 109), which provides:

> "The following persons are subject to this code:
>
> * * * * * * * * *
>
> "(11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States * * *"

It is the contention of the petitioner that the court-martial was without jurisdiction because Article 2 (11) of the Uniform Code of Military Justice was unconstitutional in so far as it authorized the trial by court-martial of this petitioner admittedly a civilian employe of the United States Army, and that as a civilian he had been deprived of his constitutional rights to indictment by a grand jury and trial by jury.

In United States of American ex rel. Dominic Guagliardo v. Neil H. McElroy, Secretary of Defense, et al., D.C.D.C., Slip Opinion dated January 13, 1958, a habeas

corpus proceeding, Judge Holtzhoff (sic) concluded that civilian employees attached to the armed forces of the United States abroad may be subjected to trial by court-martial and that Article 2, subsection (11) of the Uniform Code of Military Justice is constitutional; that the court-martial by which the petitioner was tried had jurisdiction over him; that the petitioner was not unlawfully restrained of his liberty, and dismissed the petition. The
25a petitioner there was employed by the Department of the Air Force as an electrical lineman at Nouasseur Air Deport, Morocco. He was charged with larceny of Government property, and in addition, with two other persons, he was charged with conspiracy to commit larceny. He was tried and convicted by a general court-martial at the Air Depot and sentenced. The convening authority disapproved the finding of guilty on the first of the two charges, but approved the sentence on the second charge.

As in the instant case, the court's attention in the Guagliardo case was directed to United States ex rel. Toth v. Quarles, Secretary of the Air Force, 350 U.S. 11, and Reid, Superintendent, District of Columbia Jail v. Covert, 354 U.S. 1. In the Toth case it was held that a former member of the armed forces who had been discharged from the service and was no longer under the control of the armed forces was not subject to trial by court-martial for an offense committed during his term of service.

The Covert case involved the status of a wife of a member of the armed forces of the United States, who accompanied her husband while he was stationed on foreign soil and who killed her husband. The case was heard and decided by eight members of the Supreme Court as Mr. Justice Whittaker did not participate. Mr. Justice Black delivered an opinion in which the Chief Justice, Mr. Justice Douglas and and Mr. Justice Brennan joined. This opinion held in effect that civilian wives, children, and other dependents of members of the armed forces could not be constitutionally subjected to trial by court-martial since they could not be regarded as any part of the
26a armed forces. Mr. Justice Frankfurter and Mr. Justice Harlan wrote separate opinions concurring in the result but limiting their conclusion to the view that

in capital cases civilian dependents of members of the armed forces could not be constitutionally tried by court-martial. Mr. Justice Clark, with whom Mr. Justice Burton joined, wrote a dissenting opinion. As indicated by Judge Holtzoff, the only point on which a majority of the justices concurred is that in a capital case a civilian dependent of a member of the armed forces may not be tried by court-martial.

Judge Holtzoff then summarizes the present state of the Sppreme Court's decision on the question as follows:

> "A former member of the armed forces, who has been discharged and is no longer within the control of the military, is not subject to trial by court-martial for an offense committed during his term of service. (Toth.)
>
> "A wife, a child, or other dependent of a member of the armed forces is not subject to trial by court-martial in a capital case. (Covert.)
>
> "The Supreme Court has not determined whether a dependent accompanying a service man is subject to trial by court-martial in a case other than capital.
>
> "Similarly, the Supreme Court has never had occasion to decide whether a civilian employee attached to the armed forces in a foreign country, is subject to trial by court-martial."

The instant case therefore seems to provide the necessary factual base for a determination on one of the
27a two above remaining facets of this perplexing constitutional question involving courts-martial.[1]

In the light of the exhaustive coverage given this matter by the four opinions in Covert, the opinion in Guagliardo, and the opinion of Judge Latimer in United States v. Burney, 6 USCMA 776, (referred to in Guagliardo), it would seem that any further critical analysis of the authorities here would be mere supererogation.

---

[1] Mr. Justice Frankfurter in Reid v. Covert, 354 U. S. 1, 45, said, inter alia: "* * * The Court has not before it, and therefore I need not intimate any opinion on, situations involving civilians, in the sense of persons not having a military status, other than dependents. * * *"

The evidence in this case clearly shows that this petitioner killed his wife in a most inhuman and sadistically brutal fashion. I fully realize that this characterization of the crime involved is not in any sense determinative of the question involved. Murder is murder and whether it is done with the savagery of a Hun or the finesse of a story-book thriller is of no consequence.

Final termination of a state of war with the Axis powers was effected April 28, 1952. While it is true the Korean conflict began in June 1950 and ended in July 1953 (United States v. Shell, 7 USCMA 646, 23 CMR 110) and the Korean conflict has been held to constituted a state of war for the purpose of the administration of military justice (United States v. Bancroft, 3 USCMA 3, 11 CMR 3; United States v. Gann, 3 USCMA 12, 11 CMR 12; United States v. Ayers, 4 USCMA 220, 15 CMR 220; United States v. Taylor, 4 USCMA 232, 15 CMR
28a 232), the fact remains the offense involved here did not take place at or near a field during time of war or in the face of an actively hostile enemy or in an area where actual hostilities were under way.

In Covert, supra (at pages 22, 23), Mr. Justice Black stated:

> "* * * We recognize that there might be circumstances where a person could be 'in' the armed services for purposes of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform. * * *"

It may well be argued that there is not the urgency for strict military discipline at a time and in an area of peace as in a hostile area. Certainly, it would seem that the army is still charged with a heavy responsibility in connection with the conduct and behavior of its personnel, army and civilian, while on foreign soil and whether in war or in peace.

In the light of the divergent opinions in Covert and the self-defeating alternatives, enumerated and evaluated by Mr. Justice Harlan in Covert (Note 12, Page 76), I conclude, paraphrasing Mr. Justice Black, Covert supra,

that this is a circumstance where petitioner was in the armed services for purposes of Clause 14 even though he had not been formally inducted into the military and did not wear a uniform.

I further conclude, in the light of the above observations, that civilian employees attached to the armed forces of the United States abroad may be subjected to trial by court-martial, even in capital cases, and that Article
29a 2, subsection (11) of the Uniform Code of Military Justice in so far as it relates to the facts of the instant case is constitutional; that the court martial by which petitioner was tried had jurisdiction over him and that, consequently, the petitioner is not unlawfully restrained of his liberty.

The Rule to Show Cause will be discharged and the petition for a writ of Habeas Corpus will be denied.

(s) FREDERICK V. FOLLMER
United States District Judge

IN UNITED STATES DISTRICT COURT

Order—April 22, 1958

Now, to wit: April 22, 1958, for the reasons set forth in the foregoing Opinion, It is Ordered and Decreed that the petition of Albert H. Grisham for a Writ of Habeas Corpus be and the same is hereby denied, and the Rule to Show Cause issued thereon is discharged.

(s) FREDERICK V. FOLLMER
United States District Judge

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,630

ALBERT H. GRISHAM, *Appellant*

v.

JOHN C. TAYLOR, WARDEN OF UNITED STATES PENITENTIARY AT LEWISBURG, PENNSYLVANIA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

Argued October 24, 1958

Before GOODRICH, McLAUGHLIN and KALODNER, *Circuit Judges.*

Opinion of the Court—Filed November 20, 1958

By GOODRICH, *Circuit Judge.*

This is an appeal from a district court decision denying the petitioner habeas corpus, 161 F. Supp. 112 (M.D. Pa. 1958). Albert H. Grisham was a civilian accountant employed by and serving with the United States Army in France. While assigned overseas Grisham and his
32a wife resided in a rented apartment in Orleans.

Grisham was arrested by French officials as a result of the death of his wife in December, 1952. At the request of the Army he was turned over to military authorities and was charged by them with the premeditated murder of his wife, a capital offense. 10 U.S.C. § 918 (Supp. V, 1958). He was tried by a court-martial and convicted of unpremeditated homicide. Having been sentenced to prison, he now seeks release on habeas corpus proceedings.

The foundation of this petition is the Supreme Court's decision in *Reid v. Covert*, 354 U.S. 1 (1957). Our difficulty in this case is to make up our minds how far *Reid v. Covert* takes us. One thing is clear. Under that decision the wife of a man in military service who accompanies her husband abroad cannot in peacetime be tried in a foreign

country by a United States military court-martial for a capital crime. But the opinion by Mr. Justice Black was joined by only three of his colleagues. Two others, Mr. Justice Frankfurter and Mr. Justice Harlan, rendered separate concurring opinions and two, Mr. Justice Clark joined by Mr. Justice Burton, dissented.[1]

The district court, disposing of the instant case, relied largely on Judge Holtzoff's opinion in *United States ex rel. Guagliardo v. McElroy*, 158 F. Supp. 171 (D.D.C. 1958). But that decision was overruled by the Court of Appeals for the District of Columbia Circuit by a divided court (2-1). — F.2d — (D.C.Cir. 1958). *Guagliardo* involved the same statute as that in the *Covert* case. It is article 11 of the Uniform Code of Military Justice, 10 U.S.C. § 802(11) (Supp. V, 1958), which reads as follows:

> "(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States. . . ."

33a are subject to the authority of the courts-martial described by the statute.

In the *Guagliardo* case the petitioner was a civil service employee of the Air Force. The crime with which he was charged was not a capital crime but larceny. The District of Columbia Circuit Court said that it was not going to decide any constitutional question: that since the Supreme Court had said the section of the Military Justice Code when applied to person "accompany the armed forces" was unconstitutional the whole clause fell.

With due deference to a very competent court, we cannot join in this ground for granting a habeas corpus writ. The statute in question expressly contains a reservation clause providing:

> "If a part of this Act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this Act is invalid in one or more of its

[1] Mr. Justice Whittaker took no part in the consideration or decision of the case.

applications, the part remains in effect in all valid applications that are severable from the invalid applications." Pub. L. No. 1028, 84th Cong., 2d Sess., 70 A STAT. 640 (Aug. 10, 1956).

We think this provision controls, and that we must look to see whether a difference may not exist as to persons "serving with" or "employed by" from those "accompanying" the armed forces.

Granted that authority compels the conclusion that a wife accompanying her husband abroad is not to be tried by court-martial, it does not follow that persons "serving with" or "employed by" the armed forces may not be so tried. At least it does not so follow until the Supreme Court says that it does. We do not get helpful authority, then from the *Guagliardo* opinion except for a reason we cannot share.

So we are confronted with the problem of the application of the *Covert* case to a civilian employee of the armed forces serving abroad, prosecuted for a capital offense in peacetime and tried by court-martial. Grisham was charged in France with premeditated murder, a capital offense. The conviction was for unpremeditated murder which is not a capital offense.

34a.

The question involved is one which we think it is fair to say was left open by the language of Mr. Justice Black's opinion in the *Covert* case. On page 22 of Volume 354, United States Reports, he says:

> "Even if it were possible, we need not attempt here to precisely define the boundary between 'civilians' and members of the 'land and naval Forces.' We recognize that there might be circumstances where a person could be 'in' the armed services for purposes of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform."

We do not make this quotation to prove that Mr. Justice Black concluded there was a difference; only to show that the possibility was in his mind and no commitment on the point made.

We think that this civilian Army employee presents a different case from that of a soldier's wife and that the weight of consideration tends to support the argument for permitting Congress to subject him to the jurisdiction of the Court-Martial as the statute provides.[2] The fact that civilian personnel accompanying armed forces have, for a long time, apparently been treated as subject to discipline by military authorities is a factor supporting this conclusion.[3] This is not conclusive, of course. But things which have long been established practice run less danger
35a of being called unconstitutional than do innovations. See, for instance, *Ownbey v. Morgan*, 256 U.S. 94, 112 (1921); *Anderson v. Luckett*, 321 U.S. 233, 244 (1944).

There is the practical point. An army can and for years has gone along without wives accompanying it. But civilian employees are essential to the hundreds of things which an army now has to do in addition to fighting. The practical difficulties involved in denying to Courts-Martial jurisdiction over offenses by such people are set out by Mr. Justice Harlan in footnote 12 on page 76 of 354 U.S.[4]

Furthermore, these civilian employees are associating with the Army through their own volition. The soldier may have no choice as to whether he is in the Army or not. Once in, he has no choice about leaving his employment until his term expires. But the civilian can work for the Army or not as he pleases; he can decline to work further if he is told to go where he does not want to go. We think that by voluntarily associating himself with the armed forces it is not unreasonable to put him under the same discipline which members of those forces are under.

Grisham was not living on the Army base at the time of the alleged offense. But he was eligible to receive many

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[2] The Constitutional source of Congressional authority is Art. I, § 8, cl. 14: "The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces."

[3] The Government cites to us authority going back a long time to show that civilians attached to the armed forces have been subjected to military jurisdiction in time of peace. Unfortunately we do not have access to the material cited, some of which is said to be in the National Archives.

[4] See Note, *Criminal Jurisdiction Over Civilians Accompanying American Armed Forces Overseas*, 71 HARV. L. REV. 712 (1958).

privileges which the soldiers got. He could buy goods at the commissary; he could get medical and dental care; he had the benefit of the special armed services postal facilities, special customs privileges, etc. We think, therefore, that the fact that he did not live on the Army base is a matter of no significance.

In other words, Grisham was in the position of the person described by Mr. Justice Black and quoted above. He had not been formally inducted, he did not wear a uniform, but he was as closely connected with the Army as though he had.

We are advised by counsel for the respondent that appeal has been taken in one case involving a similar prob-
36a lem[5] and that certiorari is to be asked for in the District of Columbia case. If the view we have expressed is incorrect there will be opportunity for its correction when the Supreme Court has spoken.

The judgment of the district court will be affirmed.

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[5] Singleton v. Kinsella, — F. Supp. — (S.D. W. Va. 1958) (noncapital offense by a dependent wife accompanying her service husband overseas in Germany). Direct appeal to the Supreme Court is available under 28 U.S.C. § 1252 (1952).

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,630

ALBERT H. GRISHAM, *Appellant*,

vs.

JOHN C. TAYLOR, WARDEN OF UNITED STATES PENITENTIARY AT LEWISBURG, PENNSYLVANIA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Present: GOODRICH, McLAUGHLIN and KALODNER, *Circuit Judges.*

Judgment—November 20, 1958

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

(File endorsement omitted)

39a **Mandate—Signed and Sealed December 8, 1958**

UNITED STATES OF AMERICA, SS:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable the Judges of the United States District Court for the Middle District of Pennsylvania

—GREETING:

WHEREAS, lately in the United States District Court for the Middle District of Pennsylvania, before you or some of you, in a cause between Albert H. Grisham, Petitioner and John C. Taylor, Warden of U. S. Penitentiary at Lewisburg, Pennsylvania, Respondent (District Court No. 330 Habeas Corpus) an order was entered on April 22, 1958 in favor of Respondent and against Petitioner, as by the inspection of the record of the said District Court, which was

brought into the United States Court of Appeals for the Third Circuit by virtue of an appeal by Albert H. Grisham agreeably to the Act of Congress, in such case made and provided, more fully and at large appears.

AND WHEREAS, the said cause came on to be heard before the said United States Court of Appeals for the Third Circuit, on the said record, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed. November 20, 1958

40a YOU, THEREFORE, ARE HEREBY COMMANDED that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Signed and sealed this 8th day of December in the year of our Lord one thousand nine hundred and fifty-eight.

IDA O. CRESKOFF
Clerk, United States Court of Appeals for the Third Circuit

(File endorsement omitted)

41a Clerk's Certificate to foregoing transcript omitted in printing

43a SUPREME COURT OF THE UNITED STATES

No. 622, Misc., October, Term, 1958

Albert H. Grisham, *Petitioner*,

vs.

John C. Taylor, *Warden*.

Order of Substitution—April 27, 1959

On Consideration of the motion to substitute Charles R. Hagan, Warden, in the place of John C. Taylor, Warden, as the party respondent in this case,

It Is Ordered by this Court that the said motion be, and the same is hereby, granted.

45a SUPREME COURT OF THE UNITED STATES

No. 622, Misc., October, Term, 1958

Albert H. Grisham, *Petitioner*,

vs.

Charles R. Hagan, *Warden*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Order Granting Motion for Leave to Proceed in Forma Pauperis and Granting Petition for Writ of Certiorari—April 27, 1959

On Consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted and case transferred to the appellate docket as No. 870. The case is set for argument immediately following No. 725.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE 1959—511336/P. O. 1653

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 58

ALBERT H. GRISHAM,

Petitioner,

vs.

CHARLES R. HAGAN, Warden,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 58

ALBERT H. GRISHAM,

Petitioner,

vs.

CHARLES R. HAGAN, Warden,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals was filed November 20, 1958, and is reported at 261 F. 2d, 204.

The opinion of the United States District Court for the Middle District of Pennsylvania was filed April 22, 1958, and is reported at 161 F. Supp. 112.

The petition for certiorari was filed February 16, 1959, and certiorari was granted April 27, 1959 (79 S.Ct. 900).

Jurisdiction

The opinion and judgment of the Court of Appeals for the Third Circuit in this case is in conflict with the decision

of the Court of Appeals for the District of Columbia in the case of the *United States ex rel. Guagliardo* v. *McElroy*, 259 F. 2d 927 (D.C. Cir. 1958) and with the decision of this Court in the case of *Reid* v. *Covert*, 354 U.S. 1; 77 S.Ct. 1222 (1957).

(i) The date of judgment sought to be reviewed is November 20, 1958.

(ii) The statutory provision giving this Court jurisdiction to review the judgment or decree in question by writ of certiorari is 28 U.S.C. 1254 (1).

Statute and Constitutional Provisions

This case involves the Constitutionality of Art. 2 (11) of the Uniform Code of Military Justice, 10 U.S.C. 802 (11) (Supp. V 1958), which reads as follows:

> "The following persons are subject to this code:
>
> > "(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States . . . "

Petitioner contends that this statute violates the following Constitutional provisions:

Art. III, Sec. 2, cl. 3, which states:

> "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

The Fifth Amendment, which declares:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger: . . ."

And the Sixth Amendment, which provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ."

The following Constitutional provisions are relevant:

> Art. I, Sec. 8, cl. 14: "The Congress shall have power . . . to make Rules for the Government and Regulation of the land and naval Forces."
>
> Art. I, Sec. 8, cl. 18: "The Congress shall have power . . . to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Question Presented

Whether the Constitution permits the trial in a foreign country of a civilian employee of the Army by Military Court-Martial for a capital offense in time of peace?

Statement of the Case

Petitioner, then a citizen of the United States (R. 2, 9), and a civilian employee of the Army in France (R. 6), was charged with premeditated murder in violation of

Art. 118, Uniform Code of Military Justice (10 U.S.C. 918) (R. 6). Petitioner was convicted by a General Court-Martial held in France between March 20 and March 27, 1953 (R. 6, 9) of unpremeditated murder (R. 6), and was sentenced to be confined at hard labor for the term of his natural life (R. 7), a sentence subsequently reduced to thirty-five (35) years by clemency action (R. 3, 9). While serving his sentence at the United States Penitentiary at Lewisburg, Pennsylvania, he filed a petition for writ of habeas corpus and obtained a rule to show cause why it should not be allowed (R. 6). After hearing, the rule was dismissed and the petition denied (R. 21).

An appeal was taken to the United States Court of Appeals for the Third Circuit. The appeal was docketed to No. 12,630, and was argued on October 24, 1958 before Goodrich, McLaughlin and Kalodner, Circuit Judges. On November 20, 1958, an opinion was filed by Goodrich, Circuit Judge, affirming the judgment of the District Court (R. 22).

The return and answer of respondent admits that the petitioner, a civilian, is presently imprisoned at the U.S. Penitentiary, Lewisburg, Pa., under a sentence of a General Court-Martial, held under the purported authority of Art. 2 (11) of the Uniform Code of Military Justice, 10 U.S.C. 802 (R. 6).

The return and answer thus places in issue the basic question of the Constitutionality of Art. 2 (11) as applied to this petitioner under the facts of this case.

The petitioner is an accountant, and was employed as a civilian employee of the Department of the Army, assigned to the District Engineers, Nashville, Tennessee, with civilian Civil Service status. In September of 1952, petitioner was temporarily assigned to the Orleans District En-

gineers, Orleans, France (R. 11, 12). Shortly after petitioner's arrival in France, he was joined by his wife, Dolly D. Grisham, and on December 7, 1952, petitioner and his wife were residing at 74 Blvd. Alexandre Martin, Orleans, France, in an apartment rented from a French civilian (R. 12). Petitioner was furnishing food, medical care, and transportation for himself and his wife (R. 13).

During the early evening hours of December 6, 1952, petitioner and his wife attended a cocktail party and, according to the uncontradicted testimony, petitioner and his wife became intoxicated (R. 16).

About 2:30 A.M. on December 7, 1952, the petitioner notified both American military authorities and French civilian authorities of the death of his wife. After questioning by the French civilian authorities, he was arrested by them and charged with murder of his wife (Record of Trial).

Before the petitioner could be brought to trial by the French, the United States Military requested the Justice Department of the French Republic to surrender jurisdiction to the American military authorities. The French complied with this request and petitioner was subsequently tried by a General Court-Martial on a charge of premeditated murder in violation of Art. 118, Uniform Code of Military Justice, 10 U.S.C. 918. Prior to the plea on the general issue, the petitioner moved to dismiss the charge on the ground that the Court-Martial lacked jurisdiction to try the petitioner and the offense charged. This motion was predicated on petitioner's contention that jurisdiction over the person and the offense remained with France (R. 7). (See also p. 22, *et seq.* of Record of Trial, Exhibit A.) Petitioner was found guilty of the lesser and included offense of unpremeditated murder.

The alleged authority for the jurisdiction of the General Court-Martial which tried petitioner is Art. 2 (11) of the Uniform Code of Military Justice, 10 U.S.C. 802, which provides:

"The following persons are subject to this code:

"(11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces outside the continental limits of the United States . . ."

The sole question presented in this proceeding is the Constitutionality of this statute as applied to petitioner.

Summary of Argument

It is the position of the petitioner:

That the United States of America was created by the people, who ordained and fixed its powers and limitations in the Constitution. All powers of the United States—civil and military—within and without the geographical limits of the country, are based upon, derived from, and limited by the Constitution. Congress cannot deprive a citizen of his basic rights under the Constitution. A jury trial in an Article III court is a basic right in time of peace—of all citizens charged with a capital crime—who are not members of the Armed Forces. Thus, any law that undertakes to subject such a citizen, charged with such a crime in time of peace to trial by Court-Martial anywhere in the world is unconstitutional, null and void; and any judgment resulting from such trial is likewise unconstitutional, null and void.

That the provisions of Art. 2 (11) U.C.M.J., having been held unconstitutional as applied to capital cases involving civilian dependents accompanying the Armed Forces, cannot be separated into constitutional and unconstitutional fragments, and consequently stand invalid in their entirety.

Assuming *arguendo* that this Court decides that Art. 2 (11) is severable:

That petitioner is a civilian, and not a member of the Armed Forces.

That in time of peace the trial of a civilian for a capital crime by military Court-Martial is unconstitutional as a violation of Art. III, and the Fifth and Sixth Amendments.

That, in the alternative, if the Constitutional rights guaranteed petitioner are not absolute, but are to be balanced against the power and necessity for Congress to regulate the military, then the scales should be weighed heavily in favor of this petitioner. Grisham was not living on a military base—was not engaged in any essential military activity—and was charged with a capital offense.

That the method of trial alone is at issue in this case. Congress has the power to establish courts, which would give civilians working overseas with the military the protection of the Constitution, and which would meet all necessary and proper requirements for the government of the military forces.

ARGUMENT

I

When This Court in Reid v. Covert, 354 U.S. 1; 77 S.Ct. 1222 (1957) Held Unconstitutional That Part of Article 2 (11) U.C.M.J. Which Related to Capital Cases Involving Civilian Dependents Accompanying the Armed Forces Overseas, It Struck Down Article 2 (11) in Its Entirety.

In the case of *United States ex rel. Guagliardo* v. *McElroy* (259 F. 2d 927, D.C. Cir. 1958), the majority of the Court of Appeals for the District of Columbia held that Art. 2 (11) of the Uniform Code of Military Justice, having been held unconstitutional as applied to capital cases involving civilian dependents accompanying the Armed Forces, cannot be separated into constitutional and unconstitutional fragments, and consequently is invalid when applied to any civilians serving with, or employed by the Armed Forces overseas.

> "The Supreme Court has repeatedly referred to the 'wisdom of refraining from avoidable Constitutional pronouncements.' *United States* v. *International Auto. Workers*, 352 U.S. 567, 590. This settled principle leads us to decide this case on the ground of non-severability. Should we hold severable the application of the statute to appellant for the crime here charged, and go on to decide whether his conviction by court-martial was Constitutional, obviously we would be deciding an important Constitutional question. This course is not required and, therefore, should not be pursued in the circumstances of this case. The relevant precedents call for a decision on the basis spelled out in the *Reese* and kindred cases. Under those decisions we hold that subparagraph (11), which the

Supreme Court has held is invalid as presently enacted, *Reid* v. *Covert*, is nonseverable into fragments which have not been specified by Congress or as to which Congress has not furnished criteria for a case-by-case judicial application. At least the application of the subparagraph to such a civilian as appellant, charged with such an offense as is here involved, cannot be validly carved out of the invalid general spread of that provision" (*United States ex rel. Guagliardo* v. *McElroy*, 932).

The Court of Appeals for the Third Circuit in the *Grisham* case refused to follow the reasoning of the majority opinion in the *Guagliardo* case, stating as follows (R. 23):

"In the *Guagliardo* case the petitioner was a civil service employee of the Air Force. The crime with which he was charged was not a capital crime but larceny. The District of Columbia Circuit Court said that it was not going to decide any Constitutional question: that since the Supreme Court has said the section of the Military Justice Code when applied to persons who 'accompany the armed forces' was unconstitutional the whole clause fell.

"With due deference to a very competent court, we cannot join in this ground for granting a habeas corpus writ. The statute in question expressly contains a reservation clause providing:

"'If a part of this Act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this Act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications. Pub. L. No. 1028, 84th Cong., 2d Sess., 70 A STAT. 640 (Aug. 10, 1956).'

"We think this provision controls, and that we must look to see whether a difference may not exist as to persons 'serving with' or 'employed by' from those 'accompanying' the armed forces."

This Court has granted a certiorari in the *Guagliardo* case (79 S.Ct. 580), and if the reasoning of the majority opinion in that case is approved, then the Third Circuit must be reversed in the *Grisham* case. Assuming *arguendo*, however, that this Court rejects the reasoning of the majority in the *Guagliardo* case and decides that Art. 2 (11) U.C.M.J. is severable, the Constitutionality of that section as applied to the *Grisham* case must be considered.

II

The Trial of a Civilian Citizen for Any "Capital or Otherwise Infamous" Crime in Time of Peace by Military Court-Martial Is Unconstitutional.

The petitioner contends that Article 2 (11) Uniform Code of Military Justice, as applied to the facts of his case, is a violation of the following Constitutional provisions:

Art. III, Sec. 2, cl. 3, which states:

"The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

The Fifth Amendment, which declares:

"No person shall be held to answer for a *capital*, or otherwise infamous *crime*, unless on a presentment or

> indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service *in time of War* or public danger: . . ." (Emphasis supplied.)

And the Sixth Amendment, which provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ."

This contention is strongly supported by the decision of this Court in the consolidated cases of *Reid* v. *Covert* and *Kinsella* v. *Krueger*, decided June 10, 1957, 354 U.S. 1, 77 S.Ct. 1222 (1957).

In the *Covert* case, during March 1953, Clarice Covert killed her husband, a sergeant in the United States Air Force, at an air base in England, in peace time. Mrs. Covert was residing on the base with her husband. She was tried by a Court-Martial for murder under Art. 118, U.C.M.J., a capital case. The Court-Martial asserted jurisdiction under Art. 2 (11) U.C.M.J.

In the *Krueger* case, during October 1952, Mrs. Dorothy Smith killed her husband, an Army officer, at an Army post in Japan, where she was living with him in peace time. She was tried for murder by a Court-Martial, found guilty, and sentenced to life imprisonment. In this case also, the military authorities asserted jurisdiction under Art. 2 (11) U.C.M.J.

In an opinion covering the consolidated cases, hereinafter referred to as the *Covert* case, written by Mr. Justice Black, in which Chief Justice Warren, Mr. Justice Douglas, and Mr. Justice Brennan joined, the Supreme Court held that the provisions of Art. 2 (11) U.C.M.J., 10 U.S.C. 802,

were unconstitutional as applied to the trials of Mrs. Covert and Mrs. Smith. Mr. Justice Frankfurter and Mr. Justice Harlan wrote separate opinions in which they concurred with the result, but limited their conclusion to capital cases involving civilian dependents of members of the Armed Forces. Mr. Justice Clark wrote a dissenting opinion in which Mr. Justice Burton joined.

Mr. Justice Black's opinion leaves no room for doubt that the military may not deprive civilians of their Constitutional guarantees by trying them by Courts-Martial in time of peace. It would serve no useful purpose to quote all of the statements in the opinion which support this conclusion. A few are sufficient:

> "In the light of these (the Constitutional provisions quoted in this brief) as well as other Constitutional provisions, and the historical background in which they were formed, military trial of civilians is inconsistent with both the 'letter and spirit of the Constitution'" (354 U.S. 22; 77 S.Ct. 1233).
>
> "In light of this history, it seems clear that the Founders had no intention to permit the trial of civilians in military courts, where they would be denied jury trials and other Constitutional protections, merely by giving Congress the power to make rules which were 'necessary and proper' for the regulation of the 'land and naval Forces.' Such a latitudinarian interpretation of these clauses would be at war with the well-established purpose of the Founders to keep the military strictly within its proper sphere, subordinate to civil authority. The Constitution does not say that Congress can regulate 'the land and naval Forces and all other persons whose regulation might have some relationship to maintenance of the land and naval Forces.' There is no indication that the Founders con-

templated setting up a rival system of military courts to compete with civilian courts for jurisdiction over civilians who might have some contact or relationship with the Armed Forces. Courts-Martial were not to have concurrent jurisdiction with courts of law over non-military America" (354 U.S. 30; 77 S.Ct. 1237).

". . . While we recognize that the 'war powers' of the Congress and the Executive are broad, we reject the Government's argument that present threats to peace permit military trial of civilians accompanying the armed forces overseas in an area where no actual hostilities are under way. The exigencies which have required military rule on the battlefront are not present in areas where no conflict exists. Military trial of civilians 'in the field' is an extraordinary jurisdiction and it should not be expanded at the expense of the Bill of Rights. We agree with Colonel Winthrop, an expert on military jurisdiction, who declared: *'a statute cannot be framed by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace.'*" (Emphasis not supplied.) (354 U.S. 34, 35; 77 S.Ct. 1240.)

Insofar as these statements go beyond the position necessary to cover the particular facts before the Court in the *Covert* case, they must, of course, be classified as dicta. Nevertheless, it is fair to infer from these strong dicta that the trial of any civilian, for any serious crime in time of peace by a Military Court-Martial, is unconstitutional. Justices Harlan and Frankfurter are more restrained and limit their opinions to the specific facts before the Court, viz., civilian dependents of military personnel charged with capital offenses. As pointed out by Justice Frankfurter in his opinion, this does not mean that the rule of the *Covert* case would not be applied to capital cases involving civilians other than dependents:

"I repeat, I do not mean to imply that the considerations that are controlling in capital cases involving civilian dependents are constitutionally irrelevant in capital cases involving civilians other than dependents or in non-capital cases involving dependents or other civilians. I do say that we are dealing here only with capital cases and civilian dependents" (354 U.S. 46; 77 S.Ct. 1246).

The Court below seems to accept the theory of the Black opinion but concludes that Grisham was in the armed services for the "purposes of Clause 14 even though he had not formally been inducted and did not wear a uniform" (R. 26). Four grounds are given for this conclusion: (1) That long-established practice has treated civilians accompanying the armed services overseas as subject to discipline by military authorities; (2) That civilian employees are essential to the Army, dependents are not; (3) That civilian employees associate with the military overseas through their own volition; and (4) That civilian employees have many of the privileges of service men. These grounds will be considered in the order stated.

(1) Counsel for petitioner have been unable to find any authority, long-established or otherwise, for permitting the trial in a foreign country of a civilian employee of the Army by Military Court-Martial *for a capital offense in time of peace,* or, with the exception of the case of *U.S. ex rel. Mobley v. Handy,* 176 F. 2d 491 (5th Cir.) *cert. denied,* 338 U.S. 904, *rehearing denied,* 338 U.S. 945 (1949),[1]

[1] Mobley was not charged with a capital offense. He was arrested July 31, 1948, charged under Article of War 96 as administered under Manual of Courts-Martial, 1928. Art. 96 was the "catch-all" article and no capital offense could be laid under it. Art. 43 provided that no person could be "sentenced to suffer death" except "for an offense in these articles expressly made punishable by death." Art. 96 provided only punishment "at the discretion of such Court."

for any offense in time of peace. There are, of course, decisions upholding the military trial of civilians serving with the Armed Forces *in the field during time of war.*

Actually, the long-established practice and tradition of British and American law is one of reluctance to give military tribunals authority to try civilians or soldiers for non-military offenses. Mr. Justice Douglas discusses this tradition in *Lee* v. *Madigan*, 79 S.Ct. 276 (Decided January 12, 1959) at Pages 279, 280, as follows:

> "We do not write on a clean slate. The attitude of a free society to the jurisdiction of military tribunals —our reluctance to give them authority to try people for nonmilitary offenses—has a long history.
>
> "We reviewed both British and American history, touching on this point, in *Reid* v. *Covert*, 354 U.S. 1, 23-30, 77 S.Ct. 1222, 1233-1237, 1 L. Ed.2d 1148. We pointed out the great alarms sounded when James II authorized the trial of soldiers for nonmilitary crimes and the American protests that mounted when British courts-martial impinged on the domain of civil courts in this country. The views of Blackstone became deeply imbedded in our thinking: 'The necessity of order and discipline in an army is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the laws of the land.' 1 Blackstone's Commentaries 413. And see Hale, History and Analysis of the Common Law of England (1st ed. 1713), 40-41. We spoke in that tradition in *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 22, 76 S.Ct. 1, 8, 100 L. Ed. 8, 'Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service.'

"Civil courts were, indeed, thought to be better qualified than military tribunals to try nonmilitary offenses. They have a more deeply engrained judicial attitude, a more thorough indoctrination in the procedural safeguards necessary for a fair trial. Moreover, important constitutional guarantees come into play once the citizen—whether soldier or civilian—is charged with a capital crime such as murder or rape. The most significant of these is the right to trial by jury, one of the most important safeguards against tyranny which our law has designed."

In commenting on the reasons for this tradition, Sir William Blackstone said (1 Blackstone's Commentaries, 412, 413):

"When the nation was engaged in war, more veteran troops and more regular discipline were esteemed to be necessary than could be expected from a mere militia. And therefore at such times more rigorous methods were put in use for the raising of armies, and the due regulation and discipline of the soldiery: which are to be looked upon only as temporary excrescences bred out of the distemper of the state, and not as any part of the permanent and perpetual laws of the kingdom. For martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions, is, as Sir Matthew Hale observes, in truth and reality no law, but something indulged rather than allowed as a law. The necessity of order and discipline in an army is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the laws of the land. Wherefore, Thomas earl of Lancaster being condemned

at Pontefract, 15 Edw. II., by martial law, his attainder was reversed 1 Edw. III. because it was done in time of peace. And it is laid down, that if a lieutenant, or other, that hath commission of martial authority, doth in time of peace hang or otherwise execute any man by colour of martial law, this is murder; for it is against *magna carta*."

(2) It is true that civilian employees are necessary and sometimes indispensable to the Armed Forces. This is no ground, however, for subjecting them to Military Court-Martial for capital offenses in time of peace.

The argument that this is a proper ground for extending military jurisdiction is premised on the theory that a Court-Martial is more efficient in controlling and punishing crimes, or a greater deterrent to crime than other available methods of trial; or, that in the absence of a Court-Martial, no punishment could be given. The Supreme Court rejected this type of argument in the *Covert* case.

To extend military jurisdiction to civilians because they are necessary to the Armed Forces would be an extremely dangerous doctrine which could cause extensive weakening of the basic Constitutional safeguards of Art. III, and the Fifth and Sixth Amendments.

Mr. Justice Black, speaking to the point of encroachment upon the rights of citizens under the Bill of Rights and quoting from *Boyd* v. *United States*, 116 U.S. 616, 635, 29 L. Ed. 746, 752, 6 S.Ct. 524, said (*Covert*, 354 U.S. 40):

"This can only be obviated by adhering to the rule that Constitutional provisions for the security of person and property should be liberally construed."

And

> "It is the duty of courts to be watchful for the Constitutional rights of the citizen, and against any stealthy encroachments thereon."

During and since World War II, the development of atomic power, radar, electronics, and guided missiles, has resulted in an increasingly large portion of the civilian population becoming necessary to the military. If civilians serving with or employed overseas in peacetime by the military are to be subjected to Court-Martial jurisdiction solely because they are necessary to the Armed Forces, it is but a short step to subject all civilians who are necessary to the Armed Forces to military justice.

Indeed, in recent years constant international tension and increasing threat of massive destruction has become global—as imminent in Washington, D.C., as it is in Orleans, France. Thus, if military jurisdiction over civilian employees is justified because of military necessity in France, there would appear to be no logical reason why such jurisdiction should not be extended to civilian employees serving with or employed by the Armed Forces in the United States.

The Government may argue that, because an overseas commander, unlike the commander in the United States, is charged with the maintenance of discipline over civilian employees who reside on the base, there is a reason for treating civilian employees overseas in a different manner. However, this argument erroneously assumes that there is no alternate forum, and is inapplicable in the case at bar, as petitioner did not live on a military base, but in the City of Orleans (R. 12), where his alleged crime was committed.

(3) It is true that civilian employees associate with the Army through their own volition. It would also appear to be true that civilian dependents accompany the Armed Forces overseas through their own volition. Thus this is not a proper ground for distinguishing the *Grisham* case from the *Covert* case.

Furthermore, this ground implies a waiver of indictment and trial by jury when a civilian voluntarily associates himself with the Armed Forces. Such important Constitutional rights cannot be waived casually or even by implication, however. An express and intelligent consent on the part of the defendant, Government counsel, and the Court is required. Mr. Justice Sutherland in *Patton* v. *United States*, 281 U.S. 276, 312 (1929):

> "Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases above the grade of petty offenses. In such cases the value and appropriateness of jury trial have been established by long experience, and are not now to be denied. Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact-finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, *the consent of the government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant.*" (Emphasis supplied.)

None of these requirements exists in the case at bar.

(4) It is also true that civilian employees have many of the privileges of service men, but civilian dependents also have these same privileges, and this argument was rejected in the *Covert* case.

There are no supportable grounds on which to distinguish among the cases. Grisham, Mrs. Covert, and Mrs. Smith were all civilians. All three were American citizens. All three were charged with murder. All three alleged crimes were committed in a foreign country in time of peace. *The sole, and only difference is that Grisham was a civilian accountant employed by the Army Engineers, and Mrs. Covert and Mrs. Smith were civilian wives of members of the Armed Forces.* If anything, Mrs. Covert and Mrs. Smith had closer connections with the military than Grisham. They were both living on military bases, where their alleged crimes were committed. They were dependent upon the military for food, housing, medical facilities, transportation and protection. In short, their crimes were committed in a closely knit American military community, nearly isolated from the surrounding foreign nation.

Grisham, on the contrary, was living with his wife in a rented apartment in the French city of Orléans (R. 12). He and his wife furnished their own food, medical facilities and transportation (R. 13). They lived in a French community in close contact with French people, and depended on the French authorities for their protection (R. 12).

The Government also argues in this case that Court-Martial jurisdiction is essential in cases of this kind because: (1) Grisham's proximity, physical and social, to the Armed Forces justifies Court-Martial jurisdiction; (2) The adverse effect on military discipline if civilians connected with the Armed Forces are not subject to Court-Martial jurisdiction; (3) The argument that an adverse decision means that only a foreign trial could be had.

All of these arguments are effectively disposed of by Mr. Justice Frankfurter in his opinion in the *Covert* case as follows:

". . . The Government points out that civilian dependents go abroad under military auspices, *live with military personnel in a military community,* enjoy the privileges of military facilities, and that their conduct inevitably tends to influence military discipline. (Emphasis supplied.) (354 U.S. 46; 77 S.Ct. 1246.)

". . . I do not think that the proximity, physical and social of these women to the 'land and naval Forces' is, with due regard to all that has been put before us, so clearly demanded by the effective 'Government and Regulation' of those forces as reasonably to demonstrate a justification for court-martial jurisdiction over capital offenses. (354 U.S. 46, 47; 77 S.Ct. 1246.)

"The Government speaks of the 'great potential impact on military discipline' of these accompanying civilian dependents. This cannot be denied, nor should its implications be minimized. But the notion that discipline over military personnel is to be furthered by subjecting their civilian dependents to the threat of capital punishment imposed by court-martial is too hostile to the reasons that underlie the procedural safeguards of the Bill of Rights for those safeguards to be displaced. It is true that military discipline might be affected seriously if civilian dependents could commit murders and other capital crimes with impunity. No one, however, challenges the availability to Congress of a power to provide for trial and punishment of these dependents for such crimes. (Art. III, Sec. 2, cl. 3.) The method of trial alone is in issue. (354 U.S. 47; 77 S.Ct. 1246.)

"A further argument is made that a decision adverse to the Government would mean that only a foreign

trial could be had. Even assuming that the NATO Status of Forces Agreement, 4 U.S. Treaties and Other International Agreements 1792, T.I.A.S. No. 2846, covering countries where a large part of our armed forces are stationed, gives jurisdiction to the United States only through its military authorities, this Court cannot speculate that any given nation would be unwilling to grant or continue such extra-territorial jurisdiction over civilian dependents in capital cases if they were to be tried by some other manner than Court-Martial. And even if such were the case, these civilian dependents would then merely be in the same position as are so many federal employees and their dependents and other United States citizens who are subject to the laws of foreign nations when residing there." (354 U.S. 48, 49; 77 S.Ct. 1247.)

III

If the Constitutional Rights Guaranteed Petitioner Are Not Absolute, but Are to Be Balanced Against the Power of and Necessity for Congress to Regulate the Military, the Scales Should Be Weighed Heavily in Favor of the Petitioner.

Justices Frankfurter and Harlan in concurring in the result of the *Covert* case indicated that the necessary and proper clause was applicable to Article I, Section 8, clause 14; and that Article III, and the Fifth and Sixth Amendments did not necessarily apply outside of the United States under all circumstances. (*Covert* case, 43, 64, 66.)

This theory would require a balancing of the rights guaranteed to petitioner under the Constitution against the power of and necessity for Congress to regulate the Armed Forces. (*Covert* case, 44, 71-75.) As stated by

Justice Frankfurter, this theory ". . . involves regard for considerations not dissimilar to those involved in a determination under the Due Process Clause." (*Covert* case, 44.)

Under this theory, it is submitted that the ". . . scales should be tipped heavily in favor of the Bill of Rights when weighed against the immediate convenience and utility of court-martial jurisdiction over civilians employed by the military in peacetime. 'Perhaps (the founding fathers) were aware that memories fade and hoped they (by the Bill of Rights) could keep the people of this nation from having to fight again and again the same old battle for individual freedoms'" (Note, Tulane Law Review, Vol. XXXIII, page 686, quoting *Covert* case, 29-30). This is particularly true in the case of Grisham, because he was tried for a capital offense where the issue was life or death.

> "These cases involve the validity of procedural conditions for determining the commission of a crime in fact punishable by death. The taking of life is irrevocable. It is in capital cases especially that the balance of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights. Thus, in Powell v. State of Alabama, 287 U.S. 45, 71, 53 S.Ct. 55, 65, 77 L. Ed. 158, the fact 'above all that they stood in deadly peril of their lives' led the Court to conclude that the defendants had been denied due process by the failure to allow them reasonable time to seek counsel and the failure to appoint counsel." (77 S.Ct. 1245, 1246; 354 U.S. 45, 46.) (Opinion of Mr. Justice Frankfurter.)
>
> "So far as capital cases are concerned, I think they stand on quite a different footing than other offenses. In such cases the law is especially sensitive to demands for that procedural fairness which inheres in a civilian

> trial where the judge and trier of fact are not responsive to the command of the convening authority. I do not concede that whatever process is 'due' an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case. The distinction is by no means novel, compare Powell v. State of Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L. Ed. 158, with Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L. Ed. 1595; nor is it negligible, being literally that between life and death." (77 S.Ct. 1262; 354 U.S. 77.) (Opinion of Mr. Justice Harlan.)

The only fact that the respondent can point to as giving some weight on the side of the scales represented by the convenience and utility of Court-Martial jurisdiction is that Grisham was a civilian accountant working for the Army as opposed to civilian dependents in the *Covert* case. There are no facts in the record to indicate that the work Grisham was performing was essential or indispensable to any military function of the Headquarters Army Europe Communications Zone. In fact, the normal work of an accountant would appear to be fairly remote from essential or indispensable military functions. Certainly the mere fact that Petitioner was employed as an accountant should not be sufficient to warrant overriding of the requirements guaranteed by the Constitution in a capital case.

IV

Alternate Methods of Trial Available

In the briefs and oral argument in the courts below, the respondent contended that Article 2 (II) should be upheld because, *inter alia*, no satisfactory alternate forum was available where petitioner could have an Article III trial.

The French courts had primary jurisdiction in this case, and from the outset the petitioner has challenged the jurisdiction of the military and insisted upon trial by the French (R. 16, 17); of course, this would not have been an Article III trial.

Congress, however, has the power under Art. III, Sec. 2, cl. 3, to provide for the trial of crimes not committed within any state, and has provided for such trial in the district where the offender is first apprehended or first brought (18 U.S.C. 3238). In fact, the Government has frequently used this Statute to try persons charged with treason in United States District Courts.

Thus, two alternate forums were available, and Congress has the power to create a system of courts—either separate from, or within the military system—to deal with cases of this nature, and to provide the protection required by the Constitution and the Bill of Rights. (See Note, Harvard Law Review, Vol. 71, 712-727.)

Thus, to paraphrase Mr. Justice Frankfurter:

> No one challenges the availability to Congress of power to provide for trial and punishment in these cases. "The method of trial alone is in issue." (*Covert* case, 47.)

V

CONCLUSION

At issue in this case are fundamental principles of our Constitution and our form of Government. Its importance transcends this petitioner and this case. This was pointed out by Mr. Justice Davis in the case of *Ex parte Milligan*, 4 Wallace 2, 71 U.S. 2 (1866):

> "No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people; for it is the birthright of every American citizen when charged with crime, to be tried and punished according to law . . .
>
> * * * * * * *
>
> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence; . . .
>
> * * * * * * *
>
> "Martial law . . . destroys every guarantee of the Constitution, and effectually renders the 'military independent of, and superior to, the civil power,'—the attempt to do which by the King of Great Britain was

deemed by our fathers such an offense, that they assigned it to the world as one of the causes which impelled them to declare their independence . . ."

It is respectfully submitted that the Constitution does not permit the trial in a foreign country of a civilian employee of the Army by military Court-Martial for a capital offense in time of peace.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 58

ALBERT H. GRISHAM, PETITIONER

v.

CHARLES R. HAGAN, WARDEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals (R. 22–26) is reported at 261 F. 2d 204. The opinion of the District Court (R. 15–21) is reported at 161 F. Supp. 112.

JURISDICTION

The judgment of the Court of Appeals was entered on November 20, 1958 (R. 27). The petition for a writ of certiorari was filed on February 16, 1959, and granted on April 27, 1959 (R. 29), 359 U.S. 978.[1] The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

[1] The petition was granted *sub nom. Grisham* v. *Taylor*, and at the same time an order was entered substituting Charles R. Hagan, Warden, as party respondent (R. 29).

QUESTIONS PRESENTED

1. Whether, in the light of the decision in *Reid* v. *Covert,* 354 U.S. 1, Article 2(11) of the Uniform Code of Military Justice is severable so as to permit the court-martial of an employee of the armed forces serving with the armed forces overseas who commits a capital offense against a citizen of the United States in a foreign country.

2. Whether Article 2(11) of the Uniform Code of Military Justice is constitutional as applied to a person employed by the armed forces and serving overseas who commits a capital offense against a citizen of the United States in a foreign country.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The following provisions of the Constitution are involved:

> Article I, Section 8. The Congress shall have Power * * *
>
> * * * * *
>
> Clause 14. To make Rules for the Government and Regulation of the land and naval Forces. * * *
>
> * * * * *
>
> Clause 18. To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.
>
> * * * * *
>
> Amendment V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the

land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The pertinent provisions of the Uniform Code of Military Justice, Act of May 5, 1950, c. 169, Sections 1–2, 64 Stat. 108, 109, 145, provide:[2]

> ARTICLE 2 [50 U.S.C. 552]. *Persons subject to the Code.* The following persons are subject to this Code:
>
> * * * * *
>
> (11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces within the continental limits of the United States and without the following territories: That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands.
>
> * * * * *

SECTION 2. If any article or part thereof, as set out in section 1 of this Act, shall be held invalid, the remainder shall not be affected thereby.

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[2] Petitioner's trial occurred prior to January 1, 1957, the effective date of enactment of the Uniform Code of Military Justice into positive law. Accordingly, references are to Title 50.

STATEMENT

Petitioner, a citizen of the United States, was a cost accountant employed by the Corps of Engineers, Department of the Army, at Nashville, Tennessee, when, on September 30, 1952, he was assigned for temporary duty of six months with the Orleans District Engineer Office, Headquarters USAREUR Communications Zone, Orleans, France. His duties with the Army were to assist in setting up a cost accounting system for the building of the line of communication from Pardeau, France, to Kossalater, Germany (R. 12). This communications line was being constructed pursuant to this Government's NATO commitments.

Petitioner's transportation to Orleans, France, was furnished by the United States. Shortly after his arrival in France, on or about November 30, 1952, his dependent wife, Dolly Dimples Grisham, joined him (R. 13). Petitioner lived with his wife in an apartment in a private home in Orleans, France, and in lieu of having quarters furnished by the military he received a per diem allowance (R. 14–15). He was entitled to receive such military benefits as post exchange privileges, commissary privileges and transportation. His salary was paid by the United States Army Engineer Corps.

On December 7, 1952, petitioner was arrested by French police authorities and charged with the murder of his wife. The offense was alleged to have occurred on December 6, 1952. Subsequently, the French au-

thorities relinquished jurisdiction to the military authorities of the United States and petitioner was charged with the premeditated murder of his wife in violation of Article 118 of the Uniform Code of Military Justice (50 U.S.C. 712). At the arraignment, petitioner stood mute and a plea of not guilty was entered by the court-martial on his behalf (R. 6). Prior to the plea on the general issue petitioner had moved to have the charge dismissed on the ground that the court-martial lacked jurisdiction to try him for the offense charged. The basis of this motion was that jurisdiction over petitioner and over the offense remained with France and that the French authorities had not waived jurisdiction to the United States. This motion was overruled by the law officer (R. 7).

Petitioner was subsequently tried by court-martial convened in Orleans, France. He was found not guilty of premeditated murder but guilty of the lesser-included offense of unpremeditated murder. The court-martial sentenced him to life imprisonment. The convening authority reviewed the record of trial pursuant to the provisions of Articles 61 and 64 of the Uniform Code of Military Justice (50 U.S.C. 648 and 651), and approved the sentence. As required by Article 66 (50 U.S.C. 653), the entire record was forwarded to The Judge Advocate General of the Army for review by the Board of Review. Petitioner's appellate counsel filed an assignment of errors with the Board of Review in which it was claimed that pe-

titioner was not amenable to court-martial jurisdiction under Article 2(11). On December 11, 1953, the Board of Review entered its decision and approved the finding of guilty and sentence of the court-martial (R. 7-8).

Under the provisions of Article 67 of the Uniform Code (50 U.S.C. 654), the United States Court of Military Appeals granted petitioner a review of the decision of the Board of Review, and on September 24, 1954, the court affirmed this decision. *United States* v. *Grisham*, 4 U.S.C.M.A. 694, 16 C.M.R. 268. Final appellate review having been completed, the sentence was ordered into execution on October 15, 1954, and the United State Penitentiary at Lewisburg, Pennsylvania, was designated as the place of confinement.

On March 8, 1957, by clemency action, the Secretary of the Army reduced the period of confinement to 35 years (R. 8).

On October 26, 1957, petitioner filed a petition for a writ of habeas corpus in the District Court for the Middle District of Pennsylvania, alleging that Article 2(11) was unconstitutional, that the military authorities had no jurisdiction to try him, and that his confinement was therefore unlawful. After hearing, the District Court denied the petition (R. 21). On appeal, the Court of Appeals for the Third Circuit affirmed (R. 27).

SUMMARY OF ARGUMENT

I

Petitioner was tried by court-martial for having committed the capital offense of murder while he was serving in Orleans, France, as an employee of the Army, and was convicted of the lesser-included offense of unpremeditated murder (non-capital). In *Reid* v. *Covert,* 354 U.S. 1, this Court held that Article 2(11) of the Uniform Code of Military Justice cannot constitutionally be applied to civilian dependents accompanying members of the armed forces overseas who are charged with capital offenses. As we demonstrate in our brief in *McElroy* v. *Guagliardo,* No. 21, this Term, the decision in *Covert* is limited to cases involving dependents and is not applicable to employees serving with the armed forces.

The Uniform Code of Military Justice contains a severability clause manifesting the Congressional intention to permit the survival by severance of all valid parts from those declared to be invalid. Clearly, the "employed by" phrase of Article 2(11)—which is the one applicable here—is severable as a practical matter and under the Congressional design from the "accompanying" phrase which was considered in *Covert.* Critical distinctions of fact exist between the situations covered by the two phrases, for not only is there a difference with respect to the nature of the connection of the persons involved with the military, but the historical and

legal precedents also differ as to the two situations. There is every reason to believe that Congress intended to reach what it constitutionally could, and no evidence is available that Congress would have intended military jurisdiction over employees in capital cases to be destroyed merely because such jurisdiction had been struck down with respect to dependents.

II

As applied to this case, Article 2(11) is a proper exercise of the Congressional power to govern and regulate the military forces pursuant to Article 1, Section 8, Clause 14 of the Constitution.

A. As shown in our *Guagliardo* brief, the historical and legal precedents establish that non-uniformed persons, who have a close and real connection with our armed forces—particularly employees—have consistently been subject to court-martial jurisdiction where the authority of the civil courts does not extend. The test of this jurisdiction has always been the connection which the person sought to be court-martialed has with the military; the wearing of a uniform had not been determinative.

1. In accord with the British practice, which was established long prior to the Revolution, many employees of the forces have been made amenable to military jurisdiction consistently and uninterruptedly from the time Articles of War were enacted by the Continental Congress for the government of the American Revolutionary Army to the adoption of the present Uniform Code of Military Justice.

2. In providing for this military jurisdiction over employees, neither Congress nor its predecessor legislatures have recognized any distinction between capital and non-capital offenses. We have not found any actual American case involving a capital crime in peacetime, but that lack of authority is not at all dispositive. Until very recently, the United States has maintained large forces of military personnel and employees abroad only during or immediately after actual hostilities. Accordingly, until the post-World War II period there was very little occasion for the exercise of the power to try those connected with the military in areas where, as the British Articles of 1765 put it, "there is no Form of Our Civil Judicature in Force."

3. As was Guagliardo, this petitioner was an integral worker of our military establishment; he was an expert hired to perform functions in the military apparatus which were necessary to the proper operation of our armed forces abroad. Because of the interdependence of the uniformed personnel and employees serving with them, the aberrations of one affect the other, and the privileges and benefits which are peculiarly available to one are also available to the other.

4. Petitioner's assumption that a jury trial and grand jury indictment are at all times and under all circumstances available to civilians is clearly not well taken. It ignores the specific excepting clause of the Fifth Amendment, the intimate connection which employees have with the military establishment, and more particularly the fact that the first

Congress, contemporaneously with its adoption of the Fifth and Sixth Amendments, enacted Articles of War which provided for the exercise of court-martial jurisdiction over persons who were closely connected with the military but were not soldiers or officers.

B. A balancing of the various interests, such as was made by some of the Justices with respect to the dependents in *Covert*, favors court-martial jurisdiction over employees in all cases. The considerations favoring court-martial trial set forth in our *Guagliardo* brief, No. 21, also apply here in full force. And, unlike the case of dependents, these factors are not outweighed for employees charged with a capital offense by the nature of the offense. The history of military jurisdiction over employees is so long-established, so consistent, and so clear that it suffices, in and of itself, to call for a different disposition from that made in *Covert*. In addition, the relationship of these employees to the armed services is somewhat closer than that of dependents. These two factors—history and closer relationship—swing the balance the other way in this case.

ARGUMENT

I

THE "EMPLOYED BY" PHRASE OF ARTICLE 2(11) OF THE UNIFORM CODE OF MILITARY JUSTICE IS SEVERABLE FROM THE "ACCOMPANYING" PHRASE

Article 2(11) of the Uniform Code of Military Justice (*supra*, p. 3) provides for court-martial jurisdiction of persons "serving with, employed by,

or accompanying" the armed services overseas. Petitioner contends that the decision of this Court in *Reid* v. *Covert*, 354 U.S. 1—which held that Article 2(11) is unconstitutional with respect to dependents accompanying the armed forces who are charged with capital offenses—has the effect of rendering that Article unconstitutional in its entirety. This argument of the indivisibility of Article 2(11) relies wholly upon the decision and the reasoning of the Court of Appeals for the District of Columbia Circuit in *Guagliardo* v. *McElroy*, 259 F. 2d 927, No. 21, this Term. The rationale of that decision was expressly rejected by the court below in its ruling in this case (R. 23–26), and Point I of our *Guagliardo* brief (pp. 19–26) shows, we believe, the error in the District of Columbia Circuit's holding.

As we point out in *Guagliardo*, pp. 18–22, this Court held in *Covert* only that Article 2(11) cannot constitutionally be applied in time of peace to the court-martial of *civilian dependents* who are charged with *capital* offenses. The Court did not hold that no person not in uniform could be tried by a court-martial, or that no person not in uniform who is charged with a capital offense could be tried by a court-martial. The principal opinion, written by Mr. Justice Black, recognized that non-uniformed persons might, under certain circumstances, be "in" the armed services for purposes of military jurisdiction. 354 U.S. at 22–23. Further, both Mr. Justice Frankfurter and Mr. Justice Harlan emphasized in their separate concurrences that the Court was deciding only the question of the amenability to military jurisdiction of civilian dependents

accused of capital crimes. "The Court has not before it, and therefore I [Mr. Justice Frankfurter] need not intimate any opinion on, situations involving civilians, in the sense of persons not having a military status, other than dependents." 354 U.S. at 45. See also, 354 U.S. at 65. It is clear that the decision in *Covert* cannot be read to control this case as a matter of constitutional holding.

The problem, then, is whether, whatever the intended scope of the *Covert* holding, its effect is to render invalid the military trial of persons employed by the military who are accused of capital crimes, on the theory that this category of persons is either statutorily or inherently inseparable from that of dependents accused of capital offenses. However, the severability clause of the Uniform Code of Military Justice (Act of May 5, 1950, c. 169, Section 2, 64 Stat. 145) specifically provides that:

> If any article or part thereof, as set out in section 1 of this Act, shall be held invalid, the remainder shall not be affected thereby.

Article 2(11) specifically distinguishes between and applies military jurisdiction to three separate classes of persons: those serving with, those employed by, and those accompanying the armed forces outside the United States. In view of this statutory separation of the classes,[3] the very language of the severability clause precludes the automatic application, on grounds of inseverability, of a decision dealing with one of the

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[3] This case is therefore unlike *United States* v. *Reese*, 92 U.S. 214, where only one broad category was involved.

classes to another class. The severability clause, and the general rule that such a clause establishes a presumption of separability,[4] would permit the petitioner successfully to carry his burden of demonstrating inseparability[5] only if it appeared that Congress would have intended military jurisdiction over employees to fall because such jurisdiction had been struck down with respect to dependents. Petitioner has cited nothing which would support such a conclusion. On the contrary, as we indicate in our brief in *Guagliardo,* at pp. 23–24, there is every reason to believe that Congress would not have withheld court-martial jurisdiction over employees if it had known that it could not properly subject dependents to such jurisdiction.

It is true that in *Guagliardo* there is an added point of difference with *Covert* in that the offense Guagliardo committed was non-capital, while here, as in *Covert,* a capital crime was charged. But regardless of the offense involved, the distinction which exists between *Covert* and this case—that between employees and dependents—is a critical one for separability purposes. These classes are different in their relationship to the military and in the historical antecedents of that relationship (see pp. 14 ff., 24 ff., *infra*); a rule applicable to one cannot automatically be carried over to the other. Certainly, this should not be done where Congress, as here, has established a very broad direction of severability, covering specifically the separation

[4] *Williams* v. *Standard Oil Company*, 278 U.S. 235, 241–242.

[5] See *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 312, 322.

of valid parts of the statute from invalid parts. Accordingly, the constitutionality of Article 2(11) as applied to this case must be determined on its own merits.

II

ARTICLE 2(11) OF THE UNIFORM CODE IS CONSTITUTIONAL AS APPLIED TO AN EMPLOYEE OF THE ARMED FORCES SERVING ABROAD WHO IS CHARGED WITH COMMITTING A CAPITAL OFFENSE THERE

A. EMPLOYEES OF THE MILITARY SERVING IN AREAS TO WHICH THE AUTHORITY OF THE HOME COURTS DOES NOT EXTEND HAVE HISTORICALLY BEEN SUBJECT TO COURT-MARTIAL

A. In our brief in *McElroy* v. *Guagliardo,* No. 21, this Term, pp. 27–66, we present in some detail the historical materials which establish that civilians abroad, such as petitioner, closely connected with the armed services as employees, have consistently been subject to military jurisdiction. The test of court-martial jurisdiction was not, historically, premised on the wearing of a uniform; rather, amenability to trial and punishment by military authority has been based on the connection which the person had with the armed forces. Employees serving abroad who could be considered to be members of the "civil department" of the army have been deemed subject to military jurisdiction within the framework of the various Articles of War promulgated by the legislature, and no distinction has been drawn for capital cases.

1. Long prior to the American Revolution, it had been the English practice to make provision in the

Articles of War which governed the army for the court-martial of victuallers, sutlers, retainers to the camp, camp followers and of other persons directly connected with the army, irrespective of whether or not they were officers or enlisted soldiers. The Articles of War of James II contained such provisions.[6] The British Articles of 1765 which governed the British Army during the course of the American Revolution contained twelve articles providing for court-martial jurisdiction over persons who had a civilian connection with the army and who were neither soldiers or officers.[7]

Likewise during our Colonial and Revolutionary periods, the Articles of War which were adopted for the government of the American armies consistently made provision for court-martial jurisdiction over persons who were directly connected with the army. The first Articles of the Massachusetts Bay Colony, adopted April 5, 1775, had six Articles so providing, and in addition they were generally made applicable to "all Officers, Soldiers, and others concerned."[8] During the Revolution, the Articles of War adopted by the Continental Congress also included within the framework of the government and regulation of the army those who had a close connection with its operation, regardless of whether they wore uniforms. In the original Articles adopted June 30, 1775, nine of the sixty-nine rendered such persons amenable to mili-

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[6] See our brief in *Guagliardo*, at pp. 29–30.

[7] *Id.* at pp. 30–33.

[8] *Id.* at pp. 33–34.

tary jurisdiction;[9] and thirteen of the Articles adopted September 20, 1776, provided in the same manner for this military jurisdiction over such "civilians".[10] We have developed in *Guagliardo,* at pp. 37–40, that the jurisdiction so conferred was not reluctantly exercised; examples are given of its exercise over all who had a direct connection with the army, including wagon drivers, forage masters, sutlers, commissaries, etc.

From the time immediately subsequent to the adoption of the Constitution to the present, there has never been an occasion when provision was not made in the Articles of War for military jurisdiction over persons who because of their connection with the military were considered to be an integral part of our military forces, irrespective of the fact that they were not officers or soldiers. See our *Guagliardo* brief, pp. 41–51. For it was always recognized that the maintenance of an effective military apparatus requires the conferment of military jurisdiction over many persons who because of their direct connection with the military could seriously interfere with or affect military operations, particularly where our civil judicature would not operate.[11]

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[9] *Id.* at p. 34.

[10] *Id.* at pp. 35–37.

[11] See, also, St. George Tucker, *Blackstone's Commentaries With Notes of Reference to the Constitution and Laws of the Federal Government of the United States* (1803), Vol. 1, pt. 2, p. 408:

"THE military state includes the whole of the soldiery; or, such persons as are peculiarly appointed among the rest of the people for the safeguard and defence of the realm."

In support of his contrary contention that there is no long-established authority which would permit the trial by court-martial in a foreign country of civilian employees in time of peace, petitioner cites only *Lee* v. *Madigan*, 358 U.S. 228, 232–233, and Blackstone's *Commentaries*, Vol. I, pp. 412–413 (Br. 15–16). These authorities do not support his argument. *Lee* involved a military prisoner who was charged with murder while in custody of the army at Camp Cooke, California—where our civil courts were operating—in violation of Article of War 92.[12] The question which was determined by the Court was simply whether the offense, committed on June 10, 1949, occurred "in time of peace" within the statutory meaning of the Article.[13] Petitioner's allusion to Blackstone is equally inapposite, for the quotation cited is inapplicable to courts-martial as that term is used in the context of this case. The "martial law," which is criticized and condemned by Blackstone, is that system whereby the Crown, acting without the

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[12] In pertinent part this Article provided:

"* * * no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace." [10 U.S.C. 1564 (1946 ed., Supp. IV).]

[13] It is noted, however, that the Court quoted from Blackstone to the effect that (358 U.S. at 233)

"The necessity of order and discipline in an army is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the laws of the land."

By that standard this case lies within the exception, because here court-martial jurisdiction was exercised over petitioner in an area where our courts were not open and justice could not have been afforded him "according to the laws of the land."

assent or approval of Parliament, would issue Commissions to Crown officers or appoint Crown officers to sit as judges for the purpose of punishing persons who had violated the authority of the Crown. Courts-martial, in modern legal parlance, are the tribunals of the code of military justice which has been promulgated by the legislature for the government of persons connected with the military forces. The crucial distinctions between these two concepts are detailed in Clode, *The Administration of Justice Under Military and Martial Law* (London, 1872), pp. 20–42, 156–165. The martial law which Blackstone and others have severely criticized is not the assertion of court-martial jurisdiction over military persons (or those directly connected with the military) but the asserted royal "arbitrary right to punish or destroy, without legal trial, any assumed delinquent." Clode, *id.* at p. 21.

2. Petitioner also lays great stress upon the fact that he has been unable to find case authority for permitting the court-martial of civilian employees in time of peace for capital offenses.[14] As we indicate in our brief in *Guagliardo*, pp. 39–40, 52–66, civilian employees have been tried by military courts throughout our history, both in time of war and in peacetime. It is true that none of the recorded cases or instances happened to involve a capital crime. However, that fortuitous fact is not at all decisive. If, as a matter of construction of Article I, Section 8, Clause 14 of

[14] However, as petitioner concedes in his reference to *United States ex rel. Mobley* v. *Handy*, 176 F. 2d 491 (C.A. 5), certiorari denied, 338 U.S. 904, there is such authority with respect to non-capital cases.

the Constitution—based upon the historical exercise of that power—the clause is sufficiently broad to encompass employees of the military in time of peace, then it also covers employees accused of capital offenses. Certainly, none of the historical or legal materials we have found suggests that the power to try employees connected with the military was limited—either prior to, at the time of, or subsequent to the adoption of the Constitution—to non-capital offenses. Congress and its predecessors did not so consider, and the constitutional power of Congress cannot be restricted by finding that it was only sparingly implemented in actual practice by the executive.

Beyond that, military trials of employees for capital offenses are not wholly unknown in historical records. In analyzing the British Article of War which extended court-martial jurisdiction over sutlers and retainers to the camp, E. Samuel, in his treatise, the *Historical Account of the British Army, and of the Law Military* (London, 1816), p. 695, describes the exercise of this authority in a case which is peculiarly pertinent here:

> At a court martial holden at *Mello,* 14th August, 1810, *J. Smyth, a private servant* to *Assistant Commissary Sawyer,* and a *follower of the army,* was arraigned for robbing his master of the sum of one hundred and six pounds sterling, or thereabouts, at or near *Formosa de Salvador,* on or about the 19th June, 1810, and on consideration of the circumstances of the case, and of the evidence adduced thereon, the court was of opinion, that the prisoner was guilty of the charge exhibited against him, being in breach of the Articles of War, and sentenced him the

> prisoner *J. Smyth,* a follower of the army, to be hung by the neck till dead—which sentence was confirmed and ordered to be executed on the Monday following.

We have been unable to find any equivalent American trials. That is not surprising, for the instances of the exercise of the power to try non-uniformed personnel in peacetime perforce had to be rare. Ever since the British Articles of War of 1765, the power to try such persons by court-martial has generally been limited to areas "where there is no Form of Our Civil Judicature in Force." Article II, Section XX of the Articles of 1765, Winthrop, *Military Law and Precedents,* 2d ed., Reprint 1920, p. 946. Until the period following World War II, United States troops (and the employees serving with them) were not stationed in peacetime in areas where our civil courts had no jurisdiction either in sufficient numbers or for sufficient periods of time to account for many cases of any kind, much less capital cases. Prior to that time, hostilities with enemies of the United States provided the only opportunities for stationing uniformed and non-uniformed members of the land or naval forces abroad, and the principal instances of the exercise of jurisdiction accordingly would have had to occur in conjunction with military expeditions. That explains the lack of recorded peacetime cases—which does not, however, indicate that the power fails to exist.

3. We have shown in our *Guagliardo* brief (pp. 66–71) that the relationship between a military employee, like petitioner, and the armed forces overseas is so direct and close that he may validly be subjected

to court-martial jurisdiction. Since it is not feasible to train those in uniform to perform all of the functions required by the vast military establishments which must be maintained in many countries overseas, civilians are hired or assigned to fulfill these duties and thus to contribute to the overall defense position of the United States.[15] These employees are an integrated part of the military apparatus. The loss of a civilian specialist would be felt as keenly by the military as would be the loss of a specialist wearing the uniform. Likewise, because of the integration of the two contingents, the adverse effect on the military contingent of the misconduct of a civilian employee would be as great as the misconduct of a soldier or airman. It is because of this almost total interdependence of the two groups that jurisdictional control of the military services over their employees is essential.[16]

It must be remembered also that civilian employees overseas are entitled to essentially all of the privileges accorded to military personnel. Some of these privileges are detailed in our brief in *Guagliardo*, at pp. 68–69. Equivalent privileges are not available to civilian employees of the military in this country—precisely because here employees of the services are merely a part of the general civilian population, whereas overseas such employees are not. Abroad, the employees of the American military services are considered by the local population, by the services,

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[15] Petitioner concedes (Br. 17) that civilian employees "are necessary and sometimes indispensable to the Armed Forces."

[16] See our brief in *Guagliardo*, pp. 75–82.

and by the employees themselves, to be a part of the American military group.

4. Like Guagliardo and Wilson, this petitioner argues strongly (Br. 10–22) that his trial abroad by court-martial violates the jury trial provision of the Sixth Amendment and the grand jury indictment portion of the Fifth Amendment. His contentions are largely based on the incorrect assumption that all "civilians," at all times, in all circumstances, are entitled to the benefits of a jury trial and a grand jury indictment. But as we have shown *supra* and in *Guagliardo,* the authorities have long recognized that some classes of persons may be "in" the military for purposes of court-martial jurisdiction (and thus outside the group to which the pertinent provisions of the Fifth and Sixth Amendments apply) even though they wear no uniform.[17] Status for purposes of military jurisdiction cannot be determined by simply ascertaining whether or not the person involved wears a uniform or has enlisted in or has been inducted into one of the armed services. What is, and has always been, decisive is the intimacy of the connection between the military service and the person over whom jurisdiction was sought to be exercised. Where, as here, the requisite direct connection exists, jurisdiction properly obtains under Article I, Section 8, Clause 14 of the Constitution. See also our *Guagliardo* brief, pp. 41–47.

Clearly, the first Congress, which adopted the Fifth and Sixth Amendments, entertained this concept of

[17] See, *e.g.*, Mr. Justice Black's opinion in *Covert*, 354 U.S. at 22–23.

military jurisdiction. Following the proposals made by the Constitutional Convention of the original States,[18] the Congress excepted from the jury requirements all "cases arising in the land or naval forces." That this exception was not meant to be limited to cases involving soldiers and sailors actually in uniform is shown by the significant historical fact that this same Congress adopted the then existing Articles of War, which were essentially those of 1776, for the government and regulation of the Army. Act of September 29, 1789, c. 25, Sec. 4, 1 Stat. 96. Thirteen of these Articles included military jurisdiction over persons who were not soldiers, but who were connected with the Army. See our brief in *Guagliardo,* pp. 35–36. And there is no evidence which would lead to the conclusion—and this Court has never held or assumed—that the Bill of Rights restricted Clause 14 in the manner petitioner suggests.

B. THE BALANCE OF INTERESTS FAVORS COURT-MARTIAL JURISDICTION OVER SUCH EMPLOYEES IN ALL CASES

1. In *Guagliardo,* at pp. 71–108, we have urged that (a) court-martial jurisdiction over civilian employees serving with the forces abroad is a practical necessity, (b) there are no acceptable alternatives, and (c) the procedures provided by court-martial are basically fair. These arguments apply, as well, to this case. We do not repeat or summarize them here,

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[18] See, *inter alia*, the proposals of Massachusetts, New Hampshire and New York, *Documentary History of the Constitution of the United States of America* (Dept. of State, 1894), Vol. II, pp. 93–95, 141–143, 191–192.

since this case is identical with *Guagliardo* [19]—except for the capital nature of the offense, which we discuss immediately below.

2. Petitioner suggests that the fact that he was accused of a capital crime ought to be taken into account when a balance of interests is struck. The *Covert* decision clearly indicates that, at least for some members of the Court, the nature of the offense is an important factor. But it is not true that, because a capital crime is at issue, all other considerations must automatically be disregarded and give way. No such mechanical rule can be applied when questions which have been characterized as being akin to those of due process are being weighed and balanced.

We submit that for employees no distinction should be made between capital and non-capital offenses. Employees differ from dependents in two important respects bearing directly on their amenability to military jurisdiction for all crimes: (a) the history of their connection with the forces, and of their coverage within court-martial jurisdiction; and (b) their current relationship to the armed services.

(*a*). Although we believe that there are strong historical materials supporting the exercise of military jurisdiction over *dependents* in non-capital cases (see our brief in *Kinsella* v. *Singleton,* No. 22, this Term, at pp. 15-30), we also believe that the history of the amenability of *employees* to court-martial is so convincing that, on the basis of that history alone, the Court should dispose of this case differently from

[19] In France, where petitioner was stationed, there were (as of March 31, 1959) 2,902 employees of the military.

Covert. To use the words of Mr. Justice Frankfurter in that case, in our view there has been a "well-established practice—to be deemed to be infused into the Constitution—of court-martial jurisdiction" (354 U.S. at 64) over employees. As shown in our *Guagliardo* brief, and *supra*, pp. 14–20, this history has been continuous from the 17th century; military jurisdiction over such persons was well-known to, and adopted, by the new government of this country both prior to and after the Constitution; it was recognized in peacetime as well as in war wherever the authority of the civil courts did not extend; and no distinctions have ever been made between capital and non-capital crimes. In short, this is a case in which the teachings of history dominate; other factors are dwarfed by the combined and consistent practice and understanding of all branches of government since colonial times.

(*b*). In addition, the relationship of these employees to the armed forces is somewhat closer than that of dependents. See our *Guagliardo* brief, pp. 66–71. As we say there, these employees are, in the most direct way, an integral part of, and "in", the forces overseas.[20] They work side-by-side with servicemen on projects of military significance; they are subject to the control of military superiors, and not infrequently military personnel are subject to their control and direction; they enjoy the privileges provided by the military for servicemen; to the local populace and government, they are part of the American military community and the military commander is responsible

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[20] See, *e.g.*, *Duncan* v. *Kahanamoku*, 327 U.S. 304, 313; *Toth* v. *Quarles*, 350 U.S. 11, 15; *Reid* v. *Covert*, 354 U.S. 1, 22–23.

for them; and they regard themselves as part of the military group and as responsible to the military commander. Moreover, their work and services are needed and vital, particularly under present-day conditions.

These two factors, differentiating this case from *Covert,* lead to the conclusion that employees should be and are wholly amenable to court-martial jurisdiction. In capital cases, the factors tending against trial by court-martial may be the same for employees as for dependents, but the factors sustaining military jurisdiction over employees are greater. The balance therefore swings the other way.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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